LIFE AFTER THE SUPREME COURT OF CANADA: The *Howard* and *Mitchell* Petitions

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In 1994, Mr. George Howard, a member of the Mississauga Hiawatha First Nation, was told by the Supreme Court of Canada, to his considerable surprise and that of his people, that through the 1923 Williams Treaties his forebears had knowingly and readily surrendered all of their hunting, fishing, trapping and gathering rights to their traditional territory in southern Ontario, a situation that would be unique in the annals of Crown/First Nation Treaty making from the earliest time to the 21st century and which would have been tantamount to a substantive cultural renunciation and disinheritance by the Aboriginal parties to the treaties.

In 2001, Grand Chief Michael Mitchell of the Mohawks of Akwesasne, after having prevailed in the Federal Court Trial Division and the Federal Court of Appeal saw his claim for an Aboriginal right to bring personal and community goods and goods for small scale trade with certain First Nations across the Canada-U.S. border without paying duties substantially re-characterized by the Supreme Court of Canada and, on that basis, denied.

The international border was demarcated in the 18th century across traditional territories of First Nations accompanied by guarantees from the British that it was not intended to interfere with their activities or their rights. The international border runs straight through the Mohawk community of Akwesasne. The territory of the community of Akwesasne lies in part in the Province of Quebec, in part in the Province of Ontario and in part in the State of New York in the United States. The division caused by the presence of the international border affects all residents of Akwesasne on a daily basis and constitutes a profound interference with their ability to live their lives.

In *Mitchell*, the Court in fact confirmed the findings of the lower Courts that trade was «a central, distinguishing feature of the Iroquois in general and the Mohawks in particular.»[1] Nevertheless, the majority decision of the Court found that the evidence led at trial concerning the specific trade activities pleaded by Chief Mitchell did not meet the strict evidentiary test announced by the Court in a judgment released only weeks before the trial in *Mitchell*.[2] At the urging of the Crown, two justices, in separate reasons, also found that Chief Mitchell's claim as re-characterized was incompatible with state sovereignty and therefore not justiciable before the Courts of Canada.

In both these cases the Crown had, successfully in the result, argued against claims based on essential components of Mississauga and Mohawk culture, in other words, against the cultural integrity of these peoples. This might seem surprising, even alarming, given the contemporary international, constitutional and policy context.

In 1976 Canada ratified the International Covenant on Civil and Political Rights which affirms at Article 27:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[3]

On August 1, 1990, Canada deposited its instruments of ratification of the OAS Charter making Canada subject to the *American Declaration of the Rights and Duties of Man (the American Declaration)*. Article XIII of the *American Declaration* states in part:

> Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.[4]

In 1982 Canada as a nation incorporated into its Constitution what is now section 35 of the *Constitution Act,*

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[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[2] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, par. 41.

[3] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

[4] *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

1982, recognizing and affirming the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

In the landmark decision of *R. v. Sparrow*, the Supreme Court of Canada quoted with approval words of Prof. Noël Lyon regarding the effect of section 35 on sovereign claims made by the Crown:

> ...the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[5]

On January 7, 1998 in response to the Report of the Royal Commission on Aboriginal Peoples, the Government of Canada presented a *Statement of Reconciliation to Aboriginal People* acknowledging Aboriginal nations' fundamental values concerning their relationship to the Creator, the environment and each other and their responsibilities as custodians of the lands, waters and resources of their homelands, acknowledging the cruel impact of cultural superiority resulting in weakening the identity of Aboriginal peoples and formally expressing profound regret for past actions of the federal government in this regard.[6]

The reader would be justified in perceiving a certain incoherence, indeed a dissonance, between Canada's international, constitutional and policy commitments on the one hand and its stance in litigation before the domestic courts as demonstrated in *R. v. Howard and Mitchell v. M.N.R.* Mr. Howard and Chief Mitchell certainly did. They decided to question and challenge this dissonance.

George Howard filed a Petition (the *Howard Petition*) before the United Nations Human Rights Committee in October 1998 claiming violations to Article 27 of the *United Nations International Covenant on Civil and Political Rights*. The Petition alleged that the decision of the Supreme Court of Canada in *Howard* is inconsistent with the provisions of Article 27 of the Covenant and that, in addition, the positions taken by Canada and the Province of Ontario in denying the hunting, fishing, trapping and gathering rights of Mr. George Howard and the other members of the Williams Treaties First Nations are incompatible with those provisions. With respect to Canada's litigation stance, the Petition alleges that Canada failed to respect its obligation to take positive measures of protection by not intervening in support of Mr. George Howard in the *Howard* proceedings to argue for a decision from the courts compatible with Canada's international obligations.

The *Howard Petition* set out for the Committee the consequences of First Nations communities being denied the right to continue conducting traditional harvesting activities individually and in community with each other. The curtailment of these harvesting activities goes well beyond the economic impact on people deprived of access to subsistence resources. There is an impact on the social life of the communities as feasts and ceremonies involving traditional foods become impossible. There is an impact on the health of the community with a very high incidence of diabetes, heart and liver diseases in Hiawatha and in other First Nations as a result of less wild food. And there is an impact on the transmission of culture to other persons and future generations. Harvesting activities are considered part of the education of children. Denying those rights deprives the community of the incidental right to transmit this aspect of its culture. The Supreme Court of Canada has recognized the importance of ensuring the continuity of Aboriginal practices, customs and traditions and the incidental right to teach such practices, customs and traditions to younger generations.[7]

There is also an interesting constitutional division of powers issue raised by the *Howard Petition*. Canada has taken the position that it cannot negotiate hunting, fishing, trapping and gathering rights with Mr. Howard's people without the participation and consent of the Province of Ontario. Mr. Howard responds that Canada is internationally responsible for any violation by the Government of Ontario of the provisions of Article 27. The refusal by Canada and Ontario to include hunting and fishing rights in their negotiations with Hiawatha and the other First Nations parties to the Williams Treaties of 1923 is incompatible with Canada's obligations under the Articles 27 and 2(2) of the Covenant.[8]

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[5] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1106.

[6] Government of Canada, Statement of Reconciliation, *Learning from the Past*, http://www.ainc-inac.gc.ca/gs/rec_e.html.

[7] *R. v. Côté*, [1996] 3 S.C.R. 139, par. 56: «In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.»

[8] Subsection 2(2) of the Covenant provides: «Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such

Invoking section 35 of the *Constitution Act, 1982*, Mr. Howard contends that the suitable remedy would be for the Committee to urge the Government of Canada to take effective steps to recognize and ensure the exercise of constitutionally protected hunting, fishing, trapping and gathering rights through a treaty.

Substantial submissions followed the filing of the initial Petition including three submissions by Canada. On April 1, 2003 the Human Rights Committee rendered its decision on admissibility finding that Mr. Howard's Petition was admissible and should proceed to the merits. It is of not a little interest that the Committee's decision to declare Mr. Howard's Petition admissible is a rare exception in the cases that have been brought to the Committee involving Canada since 1976.[9]

On November 23, 2001, Grand Chief Michael Mitchell submitted a Petition to the Inter-American Commission on Human Rights (the *Mitchell Petition*) alleging that the denial of his rights to bring goods, duty free, across the United States/Canada border dividing the territory of his community, for the purpose of trade with other First Nations is incompatible with the provisions of Article XIII of the *American Declaration of the Rights and Duties of Man.* Subsequently, the Petition has been clarified to focus on the right of the Mohawks to trade, free of duties and taxes, both within Akwesasne Mohawk Territory and from Akwesasne Mohawk Territory with other communities of the Iroquois Confederacy. Central to the *Mitchell Petition* is the issue of the scope of cultural rights under the various international instruments and, in particular, whether economic activities can properly be seen as integral elements of a people's culture.

Chief Mitchell argues that guidance as to the appropriate test for the application of Article XIII may be found by reference to Article 27 of the *International Covenant on Civil and Political Rights* and that it is appropriate for the Commission in a world of overlapping international commitments to apply its powers relative to the *American Declaration* in the manner consonant with Canada's other international human rights obligations. It is important to note that the U.N. Human Rights Committee has taken a broad and flexible interpretation of culture within the scope of Article 27.[10]

Chief Mitchell also refers the Commission to the emerging international norms on indigenous rights recognizing that indigenous peoples can hold specific rights with cross-border dimensions. An example would be Article 35 of the *UN Draft Declaration on the Rights of Indigenous Peoples.*[11]

Similarly, Article XIV(2) of the draft *American Declaration on the Rights of Indigenous Peoples* has recognized that "Indigenous peoples have the right of assembly and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with their members living in the territory of neighboring states."[12]

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legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.» General Comment 23, adopted by the U.N. Human Rights Committee at its fiftieth session in 1994, makes it clear that in the view of the Committee, which is, after all, the expert body established by states to monitor their implementation of the *International Covenant on Civil and Political Rights*, the exercise of cultural rights «manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.» The Committee then gave some examples, noting that: «That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.»

[9] Of those 107 cases, 8 are currently listed as being at the pre-admissible stage, 1 has been declared admissible (presumably Howard), 52 have been declared inadmissible, 27 have been discontinued, and only 19 have proceeded to a determination on the merits. Canada has recently suffered a loss on the merits in the recent case of *Judge v. Canada.* Of these 19 cases which have proceeded to a determination on the merits, Canada has been found in violation in 10. ... For the last three years, Canada has been successful in having all recent cases declared inadmissible on grounds such as the non-exhaustion of domestic remedies, the non-victim status of the complainants, and a failure to substantiate the complaint. Personal communication from Prof. Joanna Harrington, updated to 14 November 2003.

[10] See *supra*, note 8. In *Chief Ominayak and the Lubicon Lake Band v. Canada* the Human Rights Committee affirmed that «the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.» The jurisprudence of the Human Rights Committee under Article 27 has also made it clear that an economic activity, such as fishing, hunting and, reindeer herding, may also fall within the rubric of a protected cultural right, where that economic activity is considered an essential element in the culture of the ethnic community. Human Rights Committee, Communication No. 167/1984 (*Ominayak v. Canada*), views adopted 10 May 1990, UN Doc. CCPR/C/38/D/167/1984, para. 32.2.

[11] Article 35 of the UN *Draft Declaration on the Rights of Indigenous Peoples*, formulated to represent the emerging norms of international law with respect to the rights of indigenous peoples, recognizes that «Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders» and further provides that «States shall take effective measures to ensure the exercise and implementation of this right.»

[12] Recognition of cross-border contact rights, and in some cases, cross-border activity rights, is also found in the following

The very interesting aspect of the *Mitchell Petition* is that it raises the issue of the effect of certain early treaties between colonial powers that stipulated rights or benefits for Indigenous populations. At trial and in the Federal Court of Appeal, Chief Mitchell had invoked the Treaty of Utrecht of 1713, the Jay Treaty of 1794 and the Treaty of Ghent of 1814.[13] The *Mitchell Petition* contends that these colonial era treaties and the obligations they set out continue to exist at international law. Moreover, the Treaty of Utrecht was a treaty of peace and as such is self-executing. Even though there are no Indigenous nations who are parties signatory to these treaties, they contain *stipulations pour autrui* which provide context for his claims and for the colonial powers' recognition of the well-foundedness of these claims.

Canadian Courts have consistently maintained that the Jay Treaty is an international treaty not incorporated into Canadian domestic law.[14] Nevertheless, I would submit that Canadian courts have not adequately taken into account the roles of international law regarding *stipulations pour autrui* nor have they analyzed the legal value of such stipulations in favour of Aboriginal peoples in international treaties that date back to the colonial era. They appear to believe that they are impeded from doing so because they are limited to applying and interpreting Canadian law and consequently, cannot decide what the legal value of the provisions of Article III of the Jay Treaty is under the rules of international law, or whether Canada, as the Successor State to Great Britain, is still bound by these promises under international law. But surely the Supreme Court's endorsement of Prof. Lyon in *Sparrow* referred to earlier suggests a more creative approach to the role of section 35 in liberating the courts.

Finally, as a remedy, Chief Mitchell requests that, pursuant to Article 41 of its Rules of Procedure, the Commission initiate its friendly settlement procedure with a view to implementing the promises made under the Jay Treaty and otherwise ensuring the Mohawks of Akwesasne the exercise of their right, under international law, to bring goods across the international border dividing their territory for the purpose of trade with other First Nations communities, part of the Iroquois Confederacy.

After exchange of Submissions between the parties, the Inter-American Commission on Human Rights has issued its Report on Admissibility finding Grand Chief Mitchell's Petition admissible pursuant to Article 37 of its Rules of procedure.[15] The Commission indicated a particular interest in a further examination of the content of the «right to culture».[16]

Finally, the Commission placed itself at the disposal of the parties with a view toward reaching a friendly settlement of the matter. As in the case of the *Howard Petition*, the decision by the Inter-American Commission on Human Rights to accept Chief Mitchell's Petition as admissible represents a rather unique development in the early stages of Canada's involvement in the human rights system of the OAS. Chief Mitchell's Petition is only the third Petition originating from Canada to be judged admissible by the Commission and is the first Petition relating to Aboriginal peoples originating from Canada to be found admissible.

In my view, the positive decisions of these international bodies indicate that international human rights bodies are prepared to consider seriously complaints by Canadian Aboriginal peoples regarding their treatment by the Crown and to generally scrutinize the relationship

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international instruments which reflect the emerging international standards that must guide state conduct towards indigenous peoples: Article 32 of the *International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples*, adopted 27 June 1989 and in force as of 5 September 1991, not yet ratified by Canada ... Article 2(5) of the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the UN General Assembly on 18 December 1992 by way of Resolution 47/135 ... Article 17(1) of the (European) *Framework Convention for the Protection of National Minorities*, ETS No. 157, adopted 1 February 1995, in force 1 February 1998.

[13] Under the Treaty of Peace and Friendship signed at Utrecht (1713), Great Britain and France guaranteed «the Five Nations or Cantons of *Indians*, subject to the Dominion of Great Britain, and other First Nations who were their allies «the full Liberty of going and coming on account of Trade» without «any Molestation or Hinderance». Article III of the Jay Treaty of 1794, between the United States and Great Britain guarantees the rights of the «Indians dwelling on either side of the said boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective territories of the Two Parties on the Continent of America ... and freely to carry on trade and commerce with each other.» It further provides that «No Duty of Entry shall be levied by either party on Peltries brought by Land or Inland Navigation into the said Territories respectively, nor shall the Indians passing and repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But goods in Bales, or other large Packages unusual among Indians shall not be considered as goods belonging bona fide to Indians.»

[14] *Mitchell v. M.N.R.*, [1999] 1 F.C.375; *R. v. Vincent*, [1993] 2 C.N.L.R. 165; *Francis v. Canada*, [1956] S.C.R. 618.

[15] Inter-American Commission on Human Rights, Report No. 74/03 Admissibility Petition P790/01 Canada, par. 38. The *Mitchell* decision on admissibility can be obtained online at: http://www.cidh.oas.org.

[16] See paragraph 38 of the Report on Admissibility.

between the Crown and Aboriginal peoples. This is as it should be. The British Imperial Crown's relationship with Indigenous peoples had at its origin the Law of Nations. The Crown in Right of Canada inherited that constitutional history. Canada's first Constitution, the British North America Act of 1867, reflected this fact by vesting responsibility and jurisdiction over Indigenous peoples in the central government and Parliament. Throughout its history and continuing to this day, Canada has concluded nation-to-nation and peoples-to-peoples treaties with the Aboriginal peoples of Canada.[17]

As the Supreme Court of Canada has affirmed on a number of occasions, in 1982 a promise was extended to the Aboriginal peoples of Canada through section 35 of the *Constitution Act, 1982* - a promise involving continued unique status, constitutionally entrenched rights, fiduciary duties owed by the Crown and positive duties to protect Aboriginal peoples and their societies, economies and rights. In *Reference Re Secession of Quebec* the Court observed:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The «promise» of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.[18]

It is interesting that these words were penned in a matter involving the dramatic convergence of Canadian history and constitutional law on the one hand and international law on the other - the question as to whether a province of Canada may unilaterally secede from the federation. The Court's reference to the contribution of the Aboriginal peoples of Canada to the building of this country is especially poignant given that it was considering arguments related to the country's dismantling. It is also encouraging to hear from individual justices of the Supreme Court, present and past, as to the use made by the Court of key international human rights instruments. Justice Lebel writing in the Supreme Court Law Review had this to say:

> With the enactment of the *Constitution Act, 1982*, the number of cases making use of international public law instruments increased dramatically. Writing on this development in the jurisprudence of the Court, Mr. Justice Gérard La Forest reported that, between 1984-1996, the Court made use of key international human rights instruments in fifty cases in interpreting the *Canadian Charter of Rights and Freedoms*. Since then, that number has doubled. La Forest J. thus explained the necessity of taking into account the applicable international law in *Charter* cases:
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> > The protection of human rights is not a uniquely Canadian concept and just as the drafters of the *Charter* drew on the experience and successes of the international human rights movement, so too would it be necessary for the Canadian courts to look abroad.[19]

It is my contention that over and above the wise words of Justices Lebel and LaForest section 35 itself should be seen as the entry point between Canadian domestic law and the emerging international law on human rights generally and Indigenous peoples in particular. It should be considered as reflecting and projecting outwards the principles applicable to Canada's conduct in international fora, standard setting or adjudicative. It should also be considered the casement through which relevant international standards, values and principles illuminate and burnish the domestic relationship between the Crown and the Aboriginal peoples of Canada.[20]

But that must be for another time and another place. ≺

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[17] See for example Lamer J. in *R. v. Sioui*, [1990] 1 S.C.R. 1025: «I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.» For modern era treaties see for example: *Campbell v. British Columbia* (Attorney General), [2000] 4 C.N.L.R. 1.

[18] *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 82.

[19] *The Supreme Court Law Review*, Second Series, Volume 16, 2002 at pp. 45-46. There are less encouraging voices, see Prof. Joanna Harrington, « International Human Rights Law in Canada's Courts: The Ahani Case» (2003) 29:2 *Canadian Council on International Law Bulletin 7-8* and also «Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection» (2003) 48 *McGill Law Journal* 55-87.

[20] See for example L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817 at paragraph 70: «...the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.»